

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO : 36232/2013

1) REPORTABLE: YES

2) OF INTEREST TO THE JUDGES: YES

(3) REVISED: YES

SIGNATURE:

DATE: 24 FEBRUARY 2025

In the matter between :

SEKOATI, THEBOGO KIM

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LTD

First Respondent

THE SHERIFF: BOKSBURG

Second Respondent

THE REGISTRAR OF DEEDS: JOHANNESBURG

Third Respondent

MANGALADZI, NTSEDZENI LEONARD

Fourth Respondent

MOKGOPE, EDWELL THABO

Fifth Respondent

MOKGOPE, ASHEL SHEILA

Sixth Respondent

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

Seventh Respondent

FIRST RAND BANK LTD

Eighth Respondent

This Judgment was handed down electronically by circulation to the parties and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 24 February 2025.

JUDGMENT

M SNYMAN, AJ

[1] In this application the applicant seeks an order in the following terms:

“1. Rescission of the default judgment granted in this matter on the 26th of July 2013.

2. The sale in execution of the property by the second respondent to the fourth respondent at the instance of the first respondent on 23 October 2015 be set aside.

3. The third respondent is ordered to expunge from its records under his control, any reference to the transfer of the property to the fourth, fifth and sixth respondents and any encumbrance upon the said property which was registered simultaneously with, or subsequent to, the said transfer to the fourth respondent.

4. *Interdicting the Registrar of Deeds (the 3rd Respondent"), from further registering the immovable property, inter alia, Erf 1[...], Vosloorus, Extension 2 Township, district Gauteng (the "immovable property"), into the name and title of any person(s), pending the final determination of the Court.*

5. *Restoring the status quo and the immovable property be reregistered into the joint community estate of William Tholang Sekoati and Tebogo Kim Sekoati (the "Applicant"), as was described on the deed of transfer TL34946/2007 dated the 3 of July 2007.*

6. *Interdicting Edward Thabo Mokgope (the 5th Respondent) and Ashel Shiela Mokgope (the 6th Respondent) from disposing of/or alienating the immovable property, inter alia, Erf 1[...], Vosloorus, Extension 2 Township, (the "immovable property"), pending the final determination of the bona fide owners and title holders of same.*

7. *Directing the Sheriff to sign all papers and/or documents where necessary that will give effect to the restoration of the immovable property, inter alia, Erf 1[...], Vosloorus, Extension 2 Township, District Gauteng (the "immovable property), into the name and title of William Tholang Sekoati and Tebogo Kim Sekoati (the Applicant).*

8. *Directing the Master of the High Court: Johannesburg (the 7th Respondent), to start the process and issue Tebogo Kim Sekoati (the Applicant) with letters of executorship, as contemplated in sections 13 and 14 of Act 66 of 1965 (as amended), in the estate of the late William Tholang Sekoati (the "deceased"), under reference number 17828/2011 — Johannesburg (the "estate").*

9. *Directing the Master of the High Court: Johannesburg (the 7th Respondent) to lodge and register with the Registrar of Deeds {the 3~ Respondent), a caveat as contemplated in section 79 of Act 66 of 1965 (as amended) and on behalf of the minor XXXXXX Sekoati.*

10. Those Respondents who oppose the application are ordered to pay the cost of the application;

11. Such further and/or alternative relief be granted to the Applicants as the above Honourable Court deems fit.”

Facts

[2] The applicant and her late husband was married in community of property.

[3] The applicant and her husband, during his life, bought the immovable property situated at Erf 1[...], Vosloorus, Extension 2 Township, Gauteng (“the property”) in 2007 for an amount of R 240 000. The purchase price of the property was financed through a loan obtained from the first respondent (“the Bank”). The loan was secured by a mortgage bond registered over the property.

[4] It is common cause that the applicant and her husband were in arrears with the monthly payments when her husband passed away in June 2011.

[5] Shortly after the passing of her husband and in July 2011 the applicant was visited by employees from the Bank who assisted her in completing the required forms required to report the estate to the Master of the High Court.

[6] It is not disputed that the forms were completed by the employees of the Bank. These forms did not reflect the house as an asset or the loan as a liability. The documents submitted completed indicating that the applicant is to be appointed as the Administrator of the estate in terms of section 18(3) of the Administration of Estates Act 66 of 1965. Shortly thereafter, the applicant was so appointed by the Master.

[7] The requirements for such an appointment is simple. The Master may appoint an Administrator for an estate of which the gross value is less than R 250 000. The

Master must however appoint an Executor in respect of any other estate of which the gross value exceeds R250 000.

It seems clear that in 2011 the value of the estate exceeded R 250 000. The property was in 2013, when the matter was before court, valued at approximately R350 000. Applicant claims in the founding affidavit signed in 2017 that the property was worth R300 000 at the time. This is not disputed by respondents. Such appointment may further only be made if there is no will. In effect, the person so appointed is tasked to take over the estate, i.e. assets and liabilities and must pay the outstanding debts.

[8] The Estate could clearly not have been dealt with in terms of Section 18(3). Why this was done is not clear from the papers. It however should have been clear to all that the property value and debt exceeded the limitations for the appointment of an Administrator.

[9] At the nub of this matter lies the question whether the procedure followed in obtaining judgment was correct and whether judgment was validly obtained.

[10] In the loan agreement and the mortgage bond entered into the applicant and her deceased husband chose an address for service of court process and an address for sending other communications or notices. This is the address referred to herein as the chosen *domicilium citandi et excutandi*.

[11] The applicant stated that neither she nor her husband noticed that this address on both documents was wrong. The address indicated on the documents was at 1[...]2 M[...] Street, Extension 2, Vosloorus, Gauteng. No such address exists. At the time of entering into the loan agreement and registration of the bond, the applicant and her husband were residing at 1[...]2 M[...] Crescent, Extension 2, Vosloorus, Gauteng. It is common cause that the bonded property is not situated at this address.

[12] When the forms submitted to the Master of the High Court were completed, it was indicated that the applicant who was to be appointed as Administrator, chose the address where the immovable property was situated at Erf 1[...], Vosloorus,

Extension 2 Township, Gauteng and situated at 1[...] M[...]3 Street, Vosloorus, Gauteng as a domicilium address for communication with the Master.

[13] Applicant stated that the chosen address as contained in the loan agreement and mortgage bond was not changed before her husband passed away. The parties accepted that the chosen domicilium was 1[...]2 M[...] Street, Extension 2, Vosloorus, Gauteng.

[14] As indicated, the applicant did not pay the outstanding loan after the passing of her husband.

[15] During April 2013 the former attorneys for the Bank sent four letters of demand in terms of section 129 of the National Credit Act to the applicant. In these letters it is stated that the loan is in arrears and it informed the applicant of her rights in terms of that section. One letter was sent to applicant in her capacity as Administrator or “Executor” as she was referred to and one to her personally. Both letters were sent to the chosen domicilium citandi et executandi at the M[...] Street address and to the physical address where applicant resides with her minor children and which was chosen as her address in the forms submitted for her appointment in terms of section 18(3) of the Administration of Estates Act.

[16] The Track and Trace slips provided to court clearly indicated that the letters sent to the residential address was collected by the applicant. It is common cause that the applicant discussed the issue with the Bank after receipt of such notice, but no agreement could be reached. Applicant indicated that a “reasonable amount” for repayment of the loan could not be agreed upon.

[17] In May of 2013 the Bank’s former attorneys issued a summons. The summons was served only on the address situated at the chosen domicilium. In the summons the address is indicated that the address was 1[...]2 M[...] Street, Vosloorus.

[18] The returns of service from the sheriff indicated that the summons was served by attaching it to the gate of the property as no other method of service was possible

despite attempts thereto. The address indicated thereon is 1[...]2 M[...] Street, Vosloorus. This method of service was used in respect of both the Applicant, as first defendant in her personal capacity and on her as second defendant in her capacity as the "...Executrix Estate Late...". As indicated it is common cause that the address indicated does not exist and is incorrect. It is also common cause that the executrix in that capacity never chose that address as her domicilium citandi et executandi vis-a-vis the Bank.

[19] At the nub of this matter lies only one issue which will be determinative of the order to be granted. That question is whether there was any service of the summons instituted against the applicant in her personal capacity and in her capacity representing the estate of her deceased husband.

[20] During argument of the matter I requested the legal representatives of the parties to provide further written heads on one issue, namely whether a chosen domicilium lapsed upon the death of a party or whether it remains valid and binding on the estate of that person. There was clearly no service on the applicant in her capacity as Executrix or Administrator, for the reason that the address was simply never chosen by her.

[21] Counsel for the Bank, by email and after the hearing of the matter, requested a postponement to be able to make further investigations. I was not amenable thereto. This matter needs to come to finality and the request was contrary to any acceptable procedure or practice. Thereafter, the Bank submitted heads of argument as requested, however attached thereto were further correspondence and documents from the Sheriff which was not under oath. These documents are dated in 2020 and was available to the Bank when the answering affidavit was filed. It was not relied on or provided to the court earlier and were not submitted under oath. As such it cannot be relied upon by the court or the Bank as it is inadmissible as evidence. As a matter of fact, I am of the view that the documents should have been made available in the answer to the application, or at least by means of a supplementary affidavit if to be relied upon by the Bank.

Requirements for valid and effective service

[22] In Section 34 of the Constitution provides as follows:

*‘34. **Access to courts** – everyone has the right to have any dispute that can be resolved by the application of law **decided in a fair public hearing before a court** or, where appropriate, another independent and impartial tribunal or forum.’*

[Emphasis added]

[23] In ***Twee Jonge Gezellen*** the Constitutional Court explained the gravity of the right to a fair hearing by quoting ***De Beer N.O. v North-Central Local Council and South-Central Local Council***:

‘This section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court is a prerequisite to an order being made against anyone is fundamental to a just and credible legal order.’¹

[24] It is clear that the right to be informed of court proceedings and to partake therein is included in this right. If this was not so, it would make a mockery of the wording thereof and the values enshrined therein.

[25] The most basic right of a respondent or defendant is to be informed of the proceedings against him/her, to be apprised of the case, and to be afforded proper time to respond to the claim and be granted the opportunity to be heard. This is supported by rules and procedures to be complied with by parties to the dispute in order to satisfy the court the respondent or defendant has been granted at least the minimum notice of the proceedings.

¹ *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA 1 (CC) para [57]

[26] In the matter of **First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd** the court referred to service as one of the cornerstones of our legal system and it is therefore required that a defendant/respondent is entitled to be informed of the process against him/her.² All rights have as its opposite an obligation. The plaintiff/applicant has in all proceedings the obligation to properly inform the defendant/respondent of the proceedings.

[27] The rules of court, the rules of conduct of legal representatives, and rules of evidence established over centuries are at the very heart of the fairness of the proceedings.

[28] In dealing with an application for rescission or even a declaratory order that the order of the court a quo is invalid and of no force and effect, the court must apply these principles in such a way that it not only protects these rights, but also advances it.

[29] The full bench in this division in the matter of **Absa Bank Ltd v Maré and Others**³ stated the position as follows:

*“[22] **The purpose of a summons or notice of motion**, so Rumpf JA held in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780D, **is to implicate or involve a defendant or respondent into a lawsuit, and that such a party is only implicated or involved in the lawsuit once service of the summons or notice of motion had been effected**. Rumpf JA also referred to *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D, where it was held that ‘[a]lthough an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him’.*”

² *First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd* 1998 (4) SA 565 (NCD) at 568 C - D

³ 2021 (2) SA 151 (GP) at para [22] – [24]

[23] In general terms, as was said by Ndlovu J in *Mouritzen v Greysones Enterprises (Pty) Ltd and another* 2012 (5) SA 74 (KZD) para 28, **the purpose of service:**

‘ . . . is, firstly, to notify the person intended to be served of the nature, contents and exigency of the process of court or other document served upon such person and, secondly, to return to the court proof of such service in the manner prescribed by law. Indeed, the Appellate Division (now the Supreme Court of Appeal) once observed in S v Watson 1969 (3) SA 405 (A) at 410A- C] that the term:

“Served . . . has the ordinary connotation of legally delivered in accordance with the law so as to notify the person on whom it is served of its contents.” ’

[24] Rule 4 of the Uniform Rules of Court prescribes the manners in which service of the process of court ‘shall be effected by the sheriff’. There are also other statutory provisions which provide for methods of service of process of court, such as s 44 of the Superior Courts Act 10 of 2013, but this appeal concerns the manner of service prescribed in r 4(1)(a)(iv), which provides for service of any process ‘if the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen’.”
[Emphasis added]

[30] In the matter of **Scott v Hough**⁴ the court found at paragraph [12] that:-

“This basic tenet of our law requires a court approached by the one party for a certain relief to hear the other party as well before granting the relief sought. In general, a court will decline to grant relief sought unless the party against whom such relief is sought has been fully and timeously apprised that relief in a particular form would be sought and that he has

⁴ 2007 (3) SA 425 (O) at [12]

had the maximum benefit of the diés induciae in other words the fullest opportunity permissible in law of considering his defensive options and practically dealing with the claim for the relief being pressed.”

[Emphasis added]

[31] It should immediately be stated that this proposition does not take away the right of the court, in exceptional circumstances, to issue an interim order, for instance when knowledge of the matter may render the order moot or in matters where judicial intervention is required as a matter of extreme urgency. In such circumstances the court should not issue a final order and grant the person the opportunity to have the provisional order overturned after giving proper notice to such a party.

[32] Therefore, no valid legal proceedings can commence against a party unless that party is notified by means of an initiating process.⁵ This position was approved by the SCA in ***D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket***.⁶ If a summons or application is therefore not served or validly served, a final order that may follow is a nullity and invalid.⁷

[33] The consequences of a final order that is a nullity or invalid has been dealt with in the matter of ***Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO & Others***⁸ and needs not be fully referred to, except to state the general principle that judgments are to be regarded as valid and enforceable until a court of competent jurisdiction pronounce otherwise. This general principle is sound.

[34] In my view any invalid process or process regarded as a nullity cannot be rescinded or the order set aside in the true sense of the word, as no order exists. The correct order in such a case would be to set aside the consequences and declare the proceedings or order to be invalid and of no force and effect. This

⁵ *Nkuta & Another v Standard Bank Ltd* (23213/2011) [2017] ZAGPJHC 282 (11 August 2017) at para [18]; *Dada v Dada* 1977 (2) SA 287 (T) at 288 C – G and the authorities listed therein

⁶ [2002] 3 All SA 1 (A)

⁷ *Richards v Meyers* 1909 TS 158

⁸ 2012 (3) SA 325 (SCA)

distinction will contribute to the application of the correct principles to such applications as they are not rescission applications and the general principles thereof is not applicable. This is so for the order could never have been granted at all.

[35] The Uniform Rules of Court sets out what will be regarded as valid service initiating a process. If service cannot be so effected, application must be made to Court to authorise substituted service.

[36] Before dealing with the content of Rule 4, it needs be pointed out that the rule will be most important when dealing with unopposed matters as the purpose of the rule, i.e. to make the other party aware of the proceedings and the opportunity to present its case, would be fulfilled when the other party is at Court or represented.

Rule 4

[37] The relevant part of rule 4 at the time of service of the summons in this matter read as follows:

“4. Service

(1) (a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners—

(i) by delivering a copy thereof to the said person personally:
Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability;

(ii) by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than 16 years of age. For the purposes of

this paragraph when a building, other than an hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family, “residence” or “place of business” means that portion of the building occupied by the person upon whom service is to be effected;

(iii) *by **delivering** a copy thereof at the place of employment of the said person, guardian, tutor, curator or the like to some person apparently not less than 16 years of age and apparently in authority over such person;*

(iv) *if the person so to be served has chosen a domicilium citandi, by **delivering or leaving a copy thereof at the domicilium so chosen;***

(v) *....”*

[38] The Appeal Court as it was known at the time stated in *Amcoal Colliers Ltd v Truter*⁹ that:

*“It is a matter of frequent occurrence that a domicilium citandi et executandi is chosen in a contract by one or more of the parties to it. **Translated, this expression means a home for the purpose of serving summons and levying execution.** (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode: see *Pretoria Hypotheek Maatschappij v Groenewald* 1915 TPD 170.) **It is a well-established practice (which is recognized by rule 4(1)(a)(iv) of the Uniform Rules of Court) that if a defendant has chosen a domicilium citandi, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found** (*Herbstein & Van Winsen, The Civil Practice of the Superior Courts of South Africa* 3rd ed., p 210. See*

⁹ 1990 (1) SA 1(A) at 14

*Muller v Mulbarton Gardens (Pty) Ltd. 1972(1) SA 328 (W) at 331 H-333 A, Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3) SA 834 (W) at 847 D-F.) It is generally accepted in our practice that the choice without more of a domicilium citandi is applicable only to the service of process in legal proceedings. (Ficksburg Transport (Edms) Bpk v Rautenbach & h Ander (supra) 333 C-D). **Parties to a contract may, however, choose an address for the service of notices under the contract. The consequences of such a choice must in principle be the same as the choice of a domicilium citandi et executandi (Cf the Ficksburg Transport case ubi cit.), namely that service at the address chosen is good service, whether or not the addressee is present at the time.***

[Emphasis added]

[39] Rule 4 was however amended in April 2024 to delete the word “leave” in sub-rule (iv) and adding the words “to a person apparently not less than 16 years old”.

[40] This amendment made the rule clear. It is no longer acceptable that a document can be served on a domicilium by leaving it on a piece of open land or even by attaching it to a door or outer gate. This amendment is however not retrospective.

[41] Despite the requirements of the rule, the court should be satisfied that service probably came to the notice of the party.¹⁰ Rule 4(10) grants the Court a discretion to require that service be effected in another way than that set out in rule 4 if it is not satisfied with the effectiveness of the service.¹¹

[42] Despite the finding of the court in *Amcoal Colliers Ltd*¹² the full bench of this court in *Absa Bank Ltd v Maré and Others*¹³ found that:

¹⁰ *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission and Others* 1999 (4) SA 1 (SCA) at [22]

¹¹ ‘Whenever the court is not satisfied as to the effectiveness of the service, it may order such further steps to be taken as it deems fit.’

¹² 1990 (1) SA 1(A)

¹³ 2021 (2) SA 151 (GP) at para [26]

“The manner in which a process may be delivered or left at a domicilium in terms of r 4(1)(a)(iv) is not prescribed and depends on the prevailing circumstances. The relevant provisions of the loan agreement in question (clause 37) also do not prescribe the manner of delivery or of acceptance at Ms Mare’s chosen domicilium address. The duty upon a sheriff is to serve a notice or process of court at a domicilium citandi by delivering or leaving the notice or process in a manner by which in the ordinary course the notice or process would come to the attention and be received by the intended recipient, and to report to the court how the process was served and why it was served in that manner. The delivery requirement at a domicilium citandi, as was said by Margo J in Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd 1984 (3) SA 834 (W) at 849A-B, ‘. . . presupposes delivery in any manner by which in the ordinary course the notice would come to the attention of and be received by the lessor. The obvious method would be by handing the notice to a responsible employee, or by pushing it under the front door, or by placing it in the mailbox.’”

[Emphasis added]

[43] Rule 4(i)(a)(iv), before and after the amendment, provides therefore that service “may” take place at a chosen domicilium citandi et executandi. That being said, it is clear that the plaintiff or applicant is not obliged to serve at the chosen address.

[44] The full bench of the Gauteng Division, Johannesburg in the matter of ***Shepard v Emmerich***,¹⁴ referring to the court a quo, approved the reference to the English practice and concluded that where a specific method of effecting service is contractually agreed, that method should be strictly complied with. This however does not place an obligation on a party to serve at the particular address. It cannot be authority that a party is obliged to serve at such address, except if so agreed explicitly.

¹⁴ 2015 (3) SA 309 (GJ) at para [4]

[45] The wording of paragraph 34 of the loan agreement and mortgage bond in this matter clearly indicates that any documents and process “may be served” at the chosen address. It also, as in most similar agreements, gives the creditor the right to change the address so chosen by giving notice to the Bank in writing.

[46] The wording as indicated above also indicates that the Bank is not obliged to serve at such address as it “may” deliver the documents at that address.

[47] The reasoning is not only supported by the normal meaning of the word “may”, but also the overriding authority of the court in terms of rule 4(10) wherein the court is granted a discretion to order another way of service if not satisfied that the process probably came to the knowledge of the intended person.

[48] The further question is, what is the position if the Bank knows that service at the address will not come to the knowledge of the other party.¹⁵

[49] I am of the view that there is an obligation on a party to place that evidence before court in order to determine if it is satisfied with service or to exercise its discretion in terms of Rule 4(10), referred to above.

[50] In unopposed proceedings there is a greater duty on the applicant or plaintiff to inform the court of the facts. If the litigant or his/her legal representative knows that the process or notice would probably not or did not come to the knowledge of the other party there is a duty on such party to inform the court thereof and place facts before court upon which the court can exercise its discretion in terms of Rule 4(10).

[51] It will in my view not suffice to simply place the return of service before court as it will be misleading. The legal representative of a party has an obligation first and foremost not to mislead the court and in my view has an obligation to place such facts before Court.

¹⁵ *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1(A) at 14

Nature of a chosen domicilium citandi et executandi

[52] The court stated in ***Amcoal Colliers Ltd v Truter***¹⁶ that:

“It is a matter of frequent occurrence that a domicilium citandi et executandi is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode: see Pretoria Hypotheek Maatschappij v Groenewald 1915 TPD 170.) ...”

[Emphasis added]

[53] The concept of a chosen domicilium address originated in Roman law where a person’s domicile address was the place where he/she was a resident for legal purposes. This determined *inter alia* the jurisdiction of the court over the person and meant that all legal notices and processes could be served at the person’s domicile.

[54] The question is then, how does a domicilium citandi et executandi come into being?

[55] Generally there is only two ways in which it is established, namely by agreement or through legislative prescript.

[56] I will not deal herein with the latter as it is not applicable in this matter, suffice it to refer to the choice of an address for receipt of notifications when appointed as an Executor or Administrator in terms of the Estates Act, 66 of 1965 and for instance the requirement that a Body Corporate established in terms of the Sectional Titles Act, is required to choose such an address.

[57] As stated above, the Court in the matter of ***Shepard v Emmerich***,¹⁷ concluded that where a specific method of effecting service is contractually agreed,

¹⁶ 1990 (1) SA 1(A) at 14

¹⁷ 2015 (3) SA 309 (GJ) at para [4]

that method should be strictly complied with. The wording of the contract will be determinative of the matter.

[58] Generally, as in this matter, a chosen domicile is not only chosen for the service of court process, but also for delivery of notices or other communication in terms of the agreement. Furthermore, most such agreements provide for a method to change the chosen address. It is similar in this matter, but the address was not changed at any time.

[59] In the matter of **Bowley Steels (Pty) Ltd v 10 Sterling Road (Pty) Ltd**¹⁸ the court, RS Willis AJ found that:

*“[13] ... Such service is then good, even if the process may not actually be received, **because the purpose of requiring the choice of a domicile is to relieve the party causing service of the process, from the burden of proving actual receipt**, hence the decisions in which service at a domicile has been held to be good, ...”*

[Emphasis added]

[60] The party giving notice or serving a document need only prove compliance with the requirements of the chosen method of delivery of the notice.

[61] Delivery would have to be made in the manner required by the contract.¹⁹

[62] The choice of the address is not subject to the normal terms that requires agreement, writing and signature when the contract is amended. It is a unilateral action of either party to change the domicile citandi et executandi directed in writing at the other party. Should the parties agree on a specific way of change, that is still irrelevant because the choice lies squarely within the power of the part who chose the address.

¹⁸ (2016/2461) [2017] ZAGPJHC 196 (28 June 2017)

¹⁹ *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 847B; *Lovasz and Another v Estate Rosenberg* 1940 TPD 342 at 344 at 331E – F; *SA Wimpy (Pty) Ltd v Tzouras* 1977 (4) SA 244 (W) at 248A - C

[63] It is clear that the address so chosen has a specific purpose and clearly is not one of the essentialia of the contract. In this matter there was no service on the specific chosen street address. The name of the street chosen in the agreements does not exist but the returns of service indicate that service was effected thereat.

[64] If service or delivery of the notice does not take place as agreed upon, for instance in a case where email is used as a method, but it was not agreed upon, the party giving notice would bear the onus of proving actual receipt thereof.

[65] The question then is whether the agreement that service of any process or notice would be proper if delivered or served in terms of the agreement after the death of the party who chose that address?

[66] The executor or administrator steps into the shoes of the deceased and all contracts, except those of a personal nature remains valid and enforceable. This is trite.

Validity of chosen domicilium after death

[67] A person has since Roman times two *domicilia*. That of choice and that of necessity.²⁰ As indicated above the chosen domicilium is closely related to a person's domicilium or place where a person regards himself/herself as being resident.

[68] A domicile of choice, which is voluntary, has certain requirements. It is not necessary to be expanded upon here. However, in respect of domicile of necessity the following is said by Voet in his *Commentary on the Pandects*:²¹

“Necessary domicile also includes that elected by foreigners for purposes of suit. – It is the same with the domicile which by customs of today a foreigner

²⁰ *The Selective Voet being the Commentary of the Pandects translated by Percival Gane*, 1955 vol 2, Book V, Title I, section 93(a) p 111

²¹ *The Selective Voet being the Commentary of the Pandects translated by Percival Gane*, 1955 vol 2, Book V, Title I, section 93(a) p 112

is bound to elect at the place of a law suit, if his opponent wishes, for the purpose of receiving summonses, notices and the like.....

Election of domicile lasts to execution or appeal. – An election of domicile once made does not disappear if the suit has ended by judgment, but also continues to execution, since execution is the end and aim of the whole suit. The same applies to appeal, if there has been appeal by one or other party from the judgment of the lower judge; provided that the case of appeal is also to be aired in the same place. He might however himself prefer to choose a new domicile and notify that to his opponent.

Election of domicile applies to heirs. – Should the death of the person electing have occurred while the suit is pending, there seems to be no doubt that, just as the case itself will have to be carried on to its end by the heirs in the same place, though they might themselves cherish domicile elsewhere, so also the election of domicile ought to be deemed extended for the purpose of giving notices or to summing the heirs.”

[69] It is clear that the aforementioned statements are made in respect of legal processes that have already commenced or is about to be instituted and in some instance where the litigant was a foreigner.

[70] **Voet**²² continues to state that:

“Heirs does not take forum or domicile of deceased. – To return to forum competent by reason of domicile, it should be borne in mind that , just as an heir does not succeed to the domicile of the deceased but keeps his own, so too he does not find a competent form by reason of the deceased’s domicile. It has often been approved that domicile has to be accounted among those things which are personal and disappear with the death of a person – the reason being that both its establishment and its continuation depend on the wholly on the intention and will of a

²² *The Selective Voet being the Commenatary of the Pandects translated by Percival Gane, 1955 vol 2, Book V, Title I, section 93(a) p 123*

human being. Therefore, as will ends with death, and the things that depended on such will also thereby done away with, nothing else can be said than that with death the right of domicile also have perished."

[Emphasis added]

[71] The chosen domicilium of a deceased person does not apply to the heirs or for that matter the executor or person charged to distribute the estate, despite the fact that the person stepped into the shoes of the deceased. The only exception is if the litigation has already commenced and an address chosen for that purpose.

[72] The establishment and continuation of a domicilium citandi et executandi depends wholly on the intention and will of a human being.

[73] The contract in this matter does not come to an end when the lender passes away, unlike a contract for instance for the rendering of personal services that lapses upon death. The question is then whether the choice of a domicilium citandi et executandi in a contract that survives the death of a party, will remain valid or come to an end.

[74] Having regard to the principles set out by Voet above and the purpose for choosing a domicilium citandi et executandi, such choice comes to an end when the party dies. This applies to both the delivery of notices and service of any process of court.

[75] The choice of such address is regarded as the home for service. A person cannot reside at any place after passing away.

[76] This, together with the objective of service to give notice of the proceedings or notification to that person, results therein that a chosen domicilium must lapse upon the passing of the person having chosen such address.

[77] As a result of this finding, the service on the alleged chosen domicilium was not valid. The order of court was therefore invalid and a nullity.

Requirements for declaring the judgement to be invalid and setting aside the consequences

[78] Having found that a judgment against a person not having been served with the process is invalid, the nature of the order to be granted as a result, must be investigated.

[79] In the matter of ***Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO & Others***²³ the Supreme Court of Appeal dealt with judgments that are invalid. It will be instructive to quote the relevant parts here. The reasoning of the court was that a judgment granted where the court had no jurisdiction, similarly to where a party had not been cited, was a nullity and can be ignored. It reads as follows:

“[11] What appeared to weigh with Legodi J was the following general proposition: all orders of court whether correctly or incorrectly granted have to be obeyed until they are properly set aside (Culverwell v Beira 1992 (4) SA 490 (W) at 494A-C; Bezuidenhout v Patensie Sitrus Beherend BPK 2001 (2) SA 224 (E) at 229). No doubt there are important policy considerations why that must be so. But, that raises a logically anterior question, which Legodi J described as ‘the most vexing aspect of this judgment’ - namely the status of the order of Kruger AJ. The Master contended that it was a nullity and could, without more, be disregarded. Legodi J took a contrary view.

[12] As long ago as 1883, Connor CJ stated in *G W Willis v L B Cauvin* 4 NLR 97 at 98-99:

‘The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null. The maxim extra territorium jus dicenti impune non paretur (Dig. 2.1.20) is applicable (Dig. 50.17.170 & 2.1.20; Cod. 7.48.1 & 14.4; Wes. ibi Poth. Pand. 42.1.(14,15); Voet 42.1.48; Wes. ad.

²³ 2012 (3) SA 325 (SCA) at [11] to [14]

Dig. 42.1.(5); Wes. ad. Dig. 50 17.170 & 2.1.(50); Groenwn. ad. Cod. 7.64; Christin. Decis. 4.94.2).'

Willis v L B Cauvin was cited with approval in *Lewis & Marks v Middel* 1904 TS 291 and *Sliom v Wallach's Printing and Publishing Company Ltd* 1925 TPD 650. In the former Mason J (with whom Innes CJ and Bristowe J concurred) held at 303:

'It was maintained that the only remedy was to appeal against the decision of the Land Commission; but we think that the authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2, 4, 14; and 66; 49, 8, 1, and 3; Groenewegen, ad Cod. 2; 41; 7, 54; Willis v Cauvin, 4 N.L.R. 98; Rex v Stockwell, [1903] T.S. 177; Barnett & Co. v Burmester & Co., [1903] T.H 30).'

And in the latter, *Curlewis JP* (Krause J concurring) held at 656:

'The action, therefore, of the respondent company in applying for judgment, apparently by default, against the individual partner Sliom, the appellant in the present case, was an illegal and wrongful act. A judgment was thereby obtained against a person who had not been legally cited before the Court, and the effect of that judgment is that it is a nullity; it is invalid and of no effect. In the case of Lewis & Marks v Middel, to which Mr Murray has referred us, and also in an earlier case where the Roman-Dutch authorities were examined, it was laid down on the authority of Voet that a judgment given against a person who had not been duly cited before the Court is of no effect whatsoever. It is a nullity and can be disregarded. It seems to me that is the position here. A judgment was obtained against the individual Sliom personally, whereas he

had never been cited personally and individually to appear before the Court. Therefore, that judgment was wrongly obtained against him, and that judgment, in my opinion, was a nullity as far as he was concerned. The only judgment the plaintiff, on that citation, was entitled to was against the partnership.'

[13] *Lewis & Marks and Sliom were cited with approval by this court in S v Absalom 1989 (3) SA 154 (A) at 164, which held:*

'Dit volg dus dat die Volle Hof myns insiens geen bevoegdheid gehad het om die appèl aan te hoor nie. Die gevolg, meen ek, was, soos voorspel deur Strydom R, dat die Volle Hof se uitspraak 'n nietigheid was. Sien, benewens die bronne, aangehaal deur Strydom R, Voet Commentarius ad Pandectus 49.8.1 en 3; Groenewegen De Legibus Abrogatis, Ad Cod 7.64; Lewis & Marks v Middel 1904 (TS) 291 op 303; Sliom v Wallach's Printing and Publishing Co Ltd 1925 TPD 650 op 656 en Trade Fairs and Promotions (Pty) Ltd v Thomson and Another 1984 (4) SA 177 (W) op 183D-E. Soos blyk uit hierdie bronne, het die uitspraak van 'n hof wat nie regsbevoegdheid het nie, geen regsrag nie, en kan dit eenvoudig geïgnoreer word. Groenewegen (loc cit) sê wel dat, waar dit gaan oor die nietigheid van 'n uitspraak van die Hooggeregshof, die Princeps se hulp ingeroep moet word, maar hierdie reël geld nie meer by ons nie.'

(See also State v Mkize 1962 (2) SA 457 (N) at 460; Government of the Republic of South Africa v Von Abo 2011 (5) SA 262 (SCA) paras 18 and 19.)

[14] *In my view, as I have demonstrated, Kruger AJ was not empowered to issue and therefore it was incompetent for him to have issued the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and*

of no force and effect (Schierhout v Minister of Justice 1926 AD 99 at 109). Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing. For as Coetzee J observed in Trade Fairs and Promotions (Pty) Ltd v Thomson & another 1984 (4) SA 177 (W) at 183E:

‘[i]t would be incongruous if parties were to be bound by a decision which is a nullity until a Court of an equal number of Judges has to be constituted specially to hear this point and to make such a declaration’. (See also Suid-Afrikaanse Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren & others and the Taxing Master 1964 (1) SA 162 (O) at 164D-H.)

[Emphasis added]

[80] Despite the fact that an invalid order may be ignored as concluded above, the parties may have acted thereon or execution may have been levied. An interested party may seek a declaratory order that the order was invalid or a nullity and may have the consequences set aside.

[81] Similar to an application under rule 42(1)(a), the merits of the claim is not relevant as the court only investigate the issue whether the order could have been granted.²⁴

[82] In *De Wet and Others v Western Bank Limited* stated that:²⁵

“Under the common law a judgment can be altered or set aside only under limited circumstances and the additional relief extended by the Rules of Court (Rules 31(2)(b) and 42] is intended to modify such rigid provisions but within the confines of such Rules.”

²⁴ *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 para 15-16; *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA576 (W) at 578G; *De Sousa v Kerr* 1978 (3) SA635 (W)

²⁵ 1977 (4) SA 770 (T) at 776H

[83] The courts however made it clear that the power to rescind judgments on default of appearance “**was entrusted to the discretion of courts**” and courts have laid down principles to guide them in this process.²⁶

[84] I am however of the view that as a general rule a court has no discretion if the judgment is a nullity or invalid.

[85] Even if a judgment is voidable *ab origine*, invalid or a nullity from the outset, and despite what was said in the matter on **Motala N.O.**,²⁷ it cannot merely be disregarded as the consequences thereof such as a sale in execution, may still be relied upon as it has the appearance of *res judicata*. The judgment is noted in a public record and will be looked upon and be acted upon until set aside or declared invalid.²⁸ A party, for obvious reasons, cannot simply ignore such order.

[86] Van der Linde, J in para [18] of the **Nkutha**²⁹ dealt with the question when the judgment is invalid:

“... this would be the case where there was no power to have granted it in the first place, such as where service of the process did not occur in accordance with the rules of court. The effect of the rescission of such a judgment, which would operate ex tunc, would therefore be different from the rescission of a judgment where, although service of the summons had occurred in accordance with the rules of court, the summons did not, as a fact, come to the attention of the defendant. In such a case, a rescission would operate pro nunc. This is because there was a power to have granted the default judgment, it was not erroneously granted.”

[87] In the matter of **Richards v Meyers**³⁰ the court came to the following conclusion:

²⁶ *De Wet v Western Bank Limited* 1977 (4) SA 770 (T) at 1042G-1043A

²⁷ *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO & Others* 2012 (3) SA 325 (SCA)

²⁸ *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO & Others* 2012 (3) SA 325 (SCA); *Richards v Meyers* 1909 TS 158

²⁹ *Nkutha and Another v Standard Bank of South Africa Limited and Others* (23213/2011) [2017] ZAGPJHC 282 (11 August 2017) at [18]

“Now, when an action has been begun without due citation, the subsequent proceedings are null and void. That fact gives the defendant has a right to have all those proceedings set aside, and that is surely a cause of action or matter in dispute which he is entitled to ask the magistrate to adjudicate upon, which the magistrate can try, and which it is most convenient that he should try.”

[Emphasis added]

[88] These findings are only applicable to judgements that are void, invalid or a nullity *ab origine* and not applicable if the judgment is merely voidable. That distinction has been pointed out as far back as 1909 in the matter of ***Richards v Meyers***³¹.

[89] Where a judgment is a nullity or invalid for instance for want of service, or the court not having jurisdiction, declaring the judgment invalid or setting that judgment and its consequences aside, is a separate cause of action.³²

[90] If service had not taken place either validly or at all, no process has been commenced and no valid judgment could follow. Any order granted as a result will be infringing upon the defendant's right of access to court in terms of the provisions of section 34 of the Constitution. The defense becomes irrelevant as the plaintiff or applicant was never entitled to an order and a party need not show good cause.

[91] Where the court did not have the jurisdiction or authority to grant the order, the judgment is invalid and a nullity.³³

Setting aside transfers of immovable property after an invalid court order.

³⁰ 1909 TS 158 at 161 second paragraph

³¹ 1909 TS 158 at 161 second paragraph

³² *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO & Others* 2012 (3) SA 325 (SCA); *Richards v Meyers* 1909 TS 158

³³ *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO & Others* 2012 (3) SA 325 (SCA)

[92] In South Africa transfer of immovable property takes place by registration at the Deeds Office. Furthermore, once transfer has taken place to an innocent third party, such transfer cannot be set aside.

[93] In ***Nkutha and Another v Standard Bank of South Africa Limited and Others*** the court dealt with the issue as follows:³⁴

“In principle, this can be achieved – but only if the sale in execution itself can be impugned as having conferred on the sheriff no legal power to effect transfer of the property to the purchaser. And that would only have been the case if the peremptory statutory requirements relating to the sale in execution had not been complied with, or if the underlying default judgment was a nullity ab initio and thus conferred, ex tunc, no power on the sheriff to have conducted the sale in execution.

[17] If these circumstances pertain, and if therefore the real agreement (also known as the transferring agreement) whereby the transferor intended to transfer [of] ownership and the transferee in turn intended to receive ownership is void, then despite the reigning abstract theory in our law of the passing of ownership also of immovable property, ownership will not have passed and may be vindicated right down the line of the subsequent successive innocent purchasers.”

[Emphasis added]

[94] In the matter of ***Menqua and Another v Markom and Others***³⁵ the Supreme Court of Appeal concluded that the sheriff derives his or her authority to transfer ownership pursuant to a sale in execution of immovable property from rule 43(13) of the Magistrates Court Rules. In the High Court, it so derives it from the provisions of Rule 46. If the sale in execution is null and void because it violates the principle of legality, as in the present case, then the sheriff can have no authority to transfer ownership of the property in question. The purchaser will thus not acquire ownership

³⁴ (23213/2011) [2017] ZAGPJHC 282 (11 August 2017) at [16] and [17]

³⁵ 2008 (2) SA 120 (SCA) para [24]

despite registration of the property is his/her name and no subsequent sale will be valid.

Conclusion

[95] The approach of this application on the basis of a rescission is incorrect. The judgement is invalid and therefore nothing can be rescinded. The proceedings needs be declared to be invalid and the consequences be set aside. The reason therefore is the fact that there is no valid judgement and it can even be ignored.³⁶ The requirements of a rescission either at common law in terms of the rules of court do not apply.

[96] On the face of it the only defence to such a claim, leaving aside for the moment prescription insofar as it may be applicable, and may be acquiescence in the judgement which must be proven by the respondent. I however need not make a finding in this regard as the defence was not raised in this matter.

[97] A person furthermore has the right to partake in the process and be heard before an order is finally granted affecting that person's rights or interests. Those rights are part of the cluster of rights contained in section 34 of the Constitution.

[98] The Courts are obliged to jealously protect these fundamental rights as a failure will lead to the undermining of the Constitution and the rule of law.

[99] Judgement was granted on 15 May 2012, and the property was declared executable as the applicable law at the time.

[100] The property was sold at auction but it is not clear from the papers whether the applicant received notice hereof as there is no indication that there was any service of the notice of sale in execution. Be that as it may, the purchaser did not perform and the sale was set aside by the court.

³⁶ *Richards v Meyers* 1904 T.S.159

[101] A second sale was arranged, and there is even less information about this sale or any information that may lead to the sale being set aside. The second sale resulted in the property being transferred to third respondent, who in turn sold the property to fourth and fifth respondents.

[102] The third parties involved have been served with this application and chose not to oppose the relief.

[103] Having regard to the conclusion I have reached above, the sale in execution as well as the sale to fourth and fifth respondents must be set aside.

[104] An eviction application was brought by fourth and fifth respondents, under case number 6881/2016 in the Magistrate's court for the district of Ekurhuleni North, held at Boksburg. As a result of the finding above, the sale also to those respondents will be declared invalid resulting in those proceedings not being able to continue.

Costs

[105] Only the first respondent opposed the relief sought herein and in the notice of motion no costs order is sought against any of the parties not opposing the relief. The general principle is that the costs should follow the event. There is no reason to deviate from this position. The scale of the costs, however needs to be addressed.

[106] I am of the view that the costs should be granted on a scale as between attorney and client. The reasons therefore are to be found in a number of issues, but only a few will be mentioned below:

- (i) The fact that the Bank's attorneys, knowing of the fact that the applicant was not residing at the property, did not point this out to court;
- (ii) The fact that the Bank, despite the information available to it, did not place the letters and communication between it and the Sheriff's office in 2020 before court and sought to introduce it by means of heads of argument. That is not a way to place facts before court;

(iii) The fact that the Bank's employees not only mislead the applicant, but also the Master of this court in respect of the assets and liabilities of the estate;

(iv) The fact that the erstwhile attorneys of the Bank, knowing thereof that the applicant as appointed administrator did not choose an address for service and the fact that notices in terms of section 129 was sent to her address, did not inform the court thereof and did not serve at such address where she represented the estate as indicated even on the summons;

(v) The fact that the summons drawn by the Bank's erstwhile attorneys indicated that the chosen address for service of the applicant as executrix was at the former chosen domicilium; and

(vi) I am lastly of the view that the applicant should not be out of pocket as a result of the invalid judgment and process to set it have the consequences set aside.

[107] Therefore I conclude that costs should be granted on a punitive scale.

Order

[108] The default judgment granted in this matter on the 26th of July 2013 is declared invalid;

[109] The sale in execution of the property by the second respondent to the fourth respondent at the instance of the first respondent on 23 October 2015 is declared to be invalid;

[110] The third respondent is ordered to expunge from its records under his control, any reference to the transfer of the property to the fourth, fifth and sixth respondents and any encumbrance upon the said property which was registered simultaneously with, or subsequent to, the said transfer to the fourth respondent;

[111] The Registrar of Deeds (the 3rd Respondent"), is ordered to restore the status quo and the immovable property is to be reregistered into the names of the late William Tholang Sekoati and Tebogo Kim Sekoati (the "Applicant"), as was described on the deed of transfer TL34946/2007 dated the 3 of July 2007 and referred to as Erf 1[...], Vosloorus, Extention 2 Township, district Gauteng (the "immovable property");

[112] The Sheriff for the area where the property is situated is authorised and directed to sign all papers and/or documents where necessary that will give effect to the restoration of the immovable property, also known as Erf 1[...], Vosloorus, Extension 2 Township, District Gauteng (the "immovable property), into the name and title of the late William Tholang Sekoati and Tebogo Kim Sekoati (the Applicant);

[113] The first respondent is ordered to pay the costs on a scale as between attorney and client.

M SNYMAN, AJ